

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION  
STATE OF FLORIDA

INQUIRY CONCERNING A  
JUDGE: CYNTHIA A. HOLLOWAY  
NO.: 00-143

Florida Supreme Court  
Case No.: SC00-2226

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**JUDICIAL QUALIFICATIONS COMMISSION'S RESPONSE IN  
OPPOSITION TO RESPONDENT HOLLOWAY'S MOTION TO DISMISS**

COMES NOW the Florida Judicial Qualifications Commission (hereinafter referred to as the JQC), by and through the undersigned Special Counsel, and hereby files its response in opposition to Judge Cynthia A. Holloway's Motion to Dismiss and as grounds states as follows:

**I. Judge Holloway's Motion to Dismiss Should be Denied as Legally Insufficient**

The Rules of the JQC make no provision for a motion to dismiss. Under the Commission's Rules, an Investigative Panel consisting of members of the Commission is charged with the responsibility for investigating the conduct of Florida judges to determine whether there is probable cause to institute formal charges. The Commission's Rules then provide that upon the filing of Formal Charges, "the judge may serve and file an Answer," following which "the Hearing Panel shall receive, hear and determine formal charges from the Investigative Panel" (Rule 7 and 9). Although Rule 12 provides that "in all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules," a motion to dismiss is inappropriate where the Rules specifically provide for a hearing to determine probable cause and for the Judge to file an answer to the charges.

**II. General Counsel Thomas C. MacDonald, Jr. and Martha Cook Did Not Have a Conflict of Interest**

Judge Holloway's present Inquiry before the JQC is based on a pattern of her own behavior that when viewed in its totality shows repeated incomplete, misleading and untruthful testimony during depositions and court proceedings where she testified under oath. In addition, the present Inquiry alleges incidents where Judge Holloway based on her own free will, lent the prestige of her judicial office to advance the causes of her family and friends. Therefore, any allegation that the present charges should be dismissed based on unsubstantiated accusations that a conflict of interest exists between Tampa attorney Martha Cook and her partner General Counsel Thomas C. MacDonald, Jr. is nothing but a smokescreen to conceal the transgressions committed by Judge Holloway.

General Counsel Thomas MacDonald voluntarily withdrew his involvement from the present matter in April 2001 to avoid further allegations of a conflict of interest and to clear the way for a focused resolution of the issues at hand. What's more, his billing records for this case since January 2001 include a total of four short entries for reviewing materials and reports and two conversations with Chairman of the Investigative Panel, Judge James Wolf and investigator Robert Butler. The undersigned Special Counsel does not recall having a direct conversation with Mr. MacDonald about the Holloway matter since December 2000. This fact renders Judge Holloway's claim that "Mr. MacDonald's continued directives to Special

Counsel have irretrievably tainted these proceedings” meritless. Furthermore, Martha Cook’s involvement in the present matter has been slight, inconsequential and centered around the time Mr. MacDonald was hospitalized for health reasons. Therefore, Judge Holloway’s claim for dismissal based on Martha Cook’s limited participation in this matter also without merit.

Judge Holloway’s claim that Mr. MacDonald “created a role for himself... not authorized ... by the Commission’s ... rules” is meritless as well. Mr. MacDonald’s involvement in the present matter, prior to his voluntary withdrawal, was totally proper and in accordance with the JQC rules. Rule 2(6) specifically designates the General Counsel as “... advisor to the Commission and Investigative Panel, and to perform such other duties as authorized by the Commission.” (Emphasis added.) Rule 6 (j) vests power with the Investigative Panel to “...reach agreement with a judge on discipline or disability, and such stipulation shall be transmitted by it directly to the Supreme Court to accept, reject or modify in whole or in part.” (Emphasis added.) Therefore, the Rules clearly allow Mr. MacDonald as General Counsel and advisor to the Investigative Panel to participate in the case both before and after the filing of formal charges and during settlement negotiations.

**A. Judge Holloway’s Claim that General Counsel Thomas C. MacDonald, Jr. Has a Personal Bias Against Her Is False and in Bad Faith**

Judge Holloway’s Motion to Dismiss based on the allegation that General Counsel Thomas C. MacDonald harbors “bitterness” and is “resentful” against her

and her husband C. Todd Alley do to their former employment at a Tampa law firm is grounded in fantasy and is absolutely not true. Judge Holloway has only herself to blame for her present situation.

Judge Holloway began working at the subject law firm in April 1982 where she met her husband C. Todd Alley. (Holloway deposition dated, May 8, 2001, p. 7.) Mr. MacDonald was a partner in the firm at that time. However, neither Judge Holloway nor her husband Mr. Alley worked directly for Mr. MacDonald. Judge Holloway claims the present JQC case is motivated by the fact that she and her husband violated the subject firms anti-nepotism policy twenty years ago and because her husband refused to use Mr. MacDonald as a mediator. *Id* at 8-14. The undersigned asked the following questions and obtained the following answers from Judge Holloway in our attempt to explorer her claim of bias and prejudice:

Q: Okay. When did you experience any discomfort, displeasure, I don't know what adjective to use, from Mr. Tom MacDonald while you were working at Shackleford?

A: I don't really recall a direct - - anything direct.

Q: Did Mr. MacDonald ever have a conversation with you regarding your personal relationship with Mr. Alley?

A: No.

Q: Do you know in you conversations with Mr. Alley if Tom MacDonald ever approached him regarding Mr. Alley's relationship with you while at Shackleford?

A: Understand, this all happened twenty years ago almost.

Q: I totally understand, and if you don't remember, that's fine. I don't want you to guess. I just want to know in your conversations with your husband Mr. Alley, did he ever tell you that Tom MacDonald spoke to him while at Shackleford about your relationship with Mr. Alley?

A: I just don't recall.

Q: Do you know today of any reason why Tom MacDonald would have a personal, I guess, vendetta against you, for lack of a better word?

A: He doesn't like my husband.

Q: Why do you say that?

A: He said so.

Q: Did you hear Mr. MacDonald say that?

A: Not to me, no.

Q: Do you know of anyone that could testify that they heard Tom MacDonald saying that he didn't like Todd Alley?

A: Mr. Tozian.

Q: Personally, do you know why Mr. MacDonald does not like Todd Alley?

A: It would only be a guess or speculation on my part.

*Id.* at 9-11.

Judge Holloway could not articulate any specific fact, other than the claim that Mr. MacDonald does not like her husband, to substantiate her allegation of bias and prejudice. Not surprisingly, the only direct witness to Mr. MacDonald's alleged ill will is her attorney Mr. Scott Tozian. Mr. MacDonald has not had personal contact

with Mr. Alley in 12-15 years and harbors no personal animosity toward Judge Holloway. As such, Judge Holloway's Motion to Dismiss due to alleged bias and prejudice should be denied.

**B. JQC Has Attempted Good Faith Settlement Negotiations**

Judge Holloway's claim that Thomas MacDonald "refused to fairly negotiate a settlement" without Judge Holloway's admission that she lied during her deposition is not evidence of ill will, bias or prejudice. Mr. MacDonald as General Counsel and advisor to the Commission and Investigative Panel is charged with the responsibility to assist in meaningful settlement negotiations and must exercise his reasonable discretion in that capacity. It goes without saying that one of the most serious charges against Judge Holloway is her misleading testimony during the deposition in the *Adair v. Johnson* matter. Therefore, Mr. MacDonald's failure to achieve a meeting of the minds without an admission that Judge Holloway lied under oath cannot possibly be used to support a claim of bias.

Furthermore, the Hearing Panel should know that the Chairman of the Investigative Panel Judge James Wolf offered to meet with Judge Holloway and her lawyers for settlement negotiations but his offer was rejected.

**III. The JQC Has Fully Abided By Its Confidentiality Rules**

The JQC denies any and all claims by Judge Holloway that it has violated Rule 23, which mandates confidentiality of all JQC proceedings prior to the filing of

formal charges. The undersigned respectfully submits to this Hearing Panel that the alleged media leaks must be attributable to Judge Holloway and her attorneys who habitually have turned to the media in their attempt to sway public opinion in this matter. The following are examples of quotes by opposing counsel to the media:

**January 23, 2001, St. Petersburg Times** – “Her attorney, Scott Tozian, said he and the judge could have handled themselves better during the October session, which he called ‘extremely hostile’ and compared to a ‘lynching.’”

**April 5, 2001, St. Petersburg Times** – “During secret discussion, Tozian said, MacDonald told him that he did not like Holloway’s husband, lawyer C. Todd Alley, who years ago worked in the same law firm with MacDonald. ‘He said it several times,’ Tozian said.” “MacDonald ... denied saying anything to Tozian about Holloway’s husband. ‘...I have not seen him (Todd Alley) for 12 to 15 years.’”

**April 2001, Tampa Tribune** - “Her attorneys, Scott Tozian and Mike Rywant, characterized the JQC’s move as a ploy to pressure the judge into resigning. ‘She hasn’t done anything wrong’ Tozian said.”

**May 2001, Tampa Tribune** – “According to Cynthia Holloway’s attorney Scott Tozian, the judge asked Essrig in July 1999 to rearrange her schedule and hear James Holloway’s case before others on her docket so the younger Holloway could catch a flight later that afternoon. Essrig asked other attorneys waiting in her office whether they would mind. The lawyers approved, the case was heard and the Holloways were on their way, Tozian said.”

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<sup>1</sup> This rendition of the facts by Mr. Tozian is absolutely not true as evidenced by Judge Katherine Essrig’s deposition and as outlined in our Response to Judge Holloway’s Motion for Summary Judgment. Judge Essrig did not want to appear she was showing favoritism to a co-worker. She never asked any lawyers in her office whether they would mind if James Holloway was taken out of turn.

**June 20, 2001, Tampa Tribune** – “The judge was ‘bewildered’ when she learned of the additional charges, he said. ‘We think they are dead wrong about these charges,’ Tozian said.” “Tozian said the latest charges are an effort by the JQC to exert pressure on Holloway so that she will resign.”

**July 2001, Tampa Tribune** – “Holloway’s attorney called the new accusations ‘just silly.’ He said that the Judicial Qualifications Commission, which polices Florida’s Judges, is retaliating because Holloway won’t resign.” “It has been so horrendously blown out of proportion,” said Tampa lawyer Scott Tozian, ‘What can you conclude other than that it’s retaliation?’”

The Hearing Panel should note that the undersigned has refused to comment each time contacted by a representative of the media as we choose to have this case determined in the courtroom.

#### **IV. The JQC Is Not Guilty of Selective Prosecution**

To support a claim for selective prosecution, a criminal defendant or in this case, Judge Holloway bears the heavy burden of establishing at least *prima facie*, that, while others similarly situated have not generally been prosecuted ... she has been singled out due to a discriminatory selection or in bad faith, based on race, religion or the desire to prevent an exercise of constitutional rights. *State v. Court of Appeal of Florida*, 684 So.2d 1383; 1996 Fla. App. LEXIS 13159. In support of her claim of selective prosecution Judge Holloway cites to the *Brown* case which we have distinguished at length in our Response in Opposition to Judge Holloway’s Motion for Summary Judgment. There is absolutely no basis whatsoever to support a selective prosecution claim in this matter. Judge Holloway has been charged with



numerous violations of the Code of Judicial Conduct based on substantive violations of her own doing.

Furthermore, Judge Holloway's claim that the undersigned traveled to Tampa and ignored positive evidence about Judge Holloway as well as failed to interview the Judge, her husband and other witnesses is without merit. The JQC has the right to conduct its investigation in the manner and logical sequence of our preference. The undersigned did depose Judge Holloway, Mr. Alley, Mr. Ray Brooks, Ms. Cynthia Tigert, Ms. Robin Adair and Judge Holloway's Judicial Assistant and has made repeated attempts to depose Mr. James Holloway so far without success.

Additionally, Judge Holloway claims that the undersigned traveled to Tampa to "dig up new dirt." We submit to the Hearing Panel that the opposite is true. The undersigned traveled to Tampa and met with an equal number of Assistant State Attorneys and Assistant Public Defenders and well as court personnel in an effort to learn first hand Judge Holloway's reputation as a jurist. The JQC has demonstrated great restraint and discretion with use of the information gained and our decision not to expand the present investigation. However, we are prepared to formally advise the Hearing Panel of the extent of the information learned if the Hearing Panel desires.

For the foregoing reasons, Judge Holloway's Motion to Dismiss should be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand delivery on: Scott K. Tozian, Esquire, SMITH & TOZIAN, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; Michael S. Rywant, Esquire, RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A., 109 North Brush Street, Suite 500, Tampa, Florida 33602; and the Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117<sup>th</sup> Avenue, Miami, Florida 33175-1716; and by U.S. Mail on: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399-1927; John Beranek, Esquire, AUSLEY & MCMULLEN, Washington Square Building, 227 Calhoun Street, P.O. Box 391, Tallahassee, Florida 32302; Honorable James R. Wolf, Chairman, Investigative Panel, 301 S. Martin Luther King Blvd., Tallahassee, Florida 32399; and Brooke Kennerly, Executive Director, Judicial Qualifications Commission, Mount Vernon Square, 1110 Thomasville Road, Tallahassee, Florida 32303, this \_\_\_\_\_ day of September, 2001.

**CERTIFICATE OF FONT SIZE**

I hereby certify that type font used in this document is 14-point Times New Roman.

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